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OBSERVATIONS ON THE NEW GERMAN LAW OF NATIONALITY

Among the most noteworthy phenomena of modern times are the extensive exploitation of new and thinly settled countries by citizens of countries older and more thoroughly developed, and the vast increase in international trade. These movements are, of course, due largely to the improved facilities for travel and communication, which have brought nations together and made their interests coincide in a way and to an extent unknown to former generations. One of the resulting problems is the question as to the attitude which a given country is to take towards its citizens who have settled permanently in foreign lands, without any definite intention of obtaining naturalization as citizens thereof, and particularly whether it is to undertake to extend its protection to them, and, if so, to what extent.

In considering this question, it is obviously important to bear in mind the fact that persons residing in foreign lands to a great extent stimulate trade with their own country, not only by acting as commercial agents, but also by purchasing its products for their own use, and thereby, consciously or unconsciously, advertising them. Sometimes, perhaps, a country may be influenced by the political expediency of having large numbers of its citizens established in certain foreign countries. Viewing these phases of the matter, it may appear advantageous to any country to retain the allegiance of its citizens residing abroad as long as possible, and to cover them with its protection as far as possible. On the other hand, governments are confronted with the practical difficulty of extending a protection which is real, and not merely nominal, to citizens who have established themselves in foreign lands in large numbers, especially when conditions therein are unsettled. Moreover, assuming that protection by a country should be reciprocated by the performance of the ordinary duties of citizenship to that country, the right of persons permanently residing abroad to claim its protection becomes shadowy, to

say the least, unless, indeed, they are acting as actual representatives of commercial or other concerns in their country of origin. As a general principle it may be said that all persons should perform civic and political duties to some country, and when persons migrate in large numbers to a foreign land, to reside there indefinitely and avail themselves of its resources as far as possible, but fail to acquire its nationality or take a reasonable and responsible part in carrying on its government, an anomalous condition ensues, giving rise to difficult questions, for which municipal laws and international agreements have not as yet furnished a satisfactory solution.

As bearing upon the serious problems just mentioned, the new German law of nationality,¹ which went into effect January 1, 1914, is of much interest, especially as it contains some striking innovations.

The most important features of this law are the abandonment of the provision of the old law of nationality that residence abroad of ten years results in the loss of German nationality,² and the introduction of a quite novel provision, according to which Germans residing in foreign countries may retain their German nationality, under certain conditions, after obtaining naturalization as citizens of such countries. This seems to carry the principle of dual nationality further than it has ever been carried before.

The abrogation of Section 21 of the old law is supplemented by the provision of Section 13 of the new, under which persons who have already lost the German nationality by residence abroad of ten years may, without returning to Germany, resume their original nationality.

The principle underlying these changes is thus expressed by Delius:

Section 13 aims to facilitate as far as possible the reinstatement of lost members of our population as citizens again. The Federal State may (not must), accordingly, renaturalize its former citizens, their descendants, etc., who have not resumed their residence in Germany. In contrast to the citizens of other countries Germans are not in the habit, after they have established themselves abroad, of returning permanently to their homes. Reference is made especially to representatives of commerce, to members of the German communities in Palestine, to missionaries, and in general to persons who by being especially active in

¹ Printed in the SUPPLEMENT to this JOURNAL, page 217.

² Law of June 1, 1870, § 21.

the fostering of German-dom abroad, for example in German societies, and particularly by maintaining German schools and churches, do a worthy service.

The possibility of reinstatement as citizens extends not only to persons who have no citizenship but also to such former Germans and their descendants as have acquired a foreign citizenship.³

The writer of this commentary evidently had in view also Section 14 of the new law, which reads as follows:

Appointment either made or confirmed by the government or by the central or higher administrative authorities of a State to a position in the direct or indirect service of the State, in the service of a municipality or municipal association, in the public school service or in the service of a religious society recognized by one of the Federal States, counts in the case of a German as assumption and in the case of a foreigner as naturalization, except in so far as a reservation is made in the instrument of appointment or confirmation.

These provisions do not apply in the case of appointment as officer or official in the military reserve.

It is not stated in the foregoing provision that foreigners naturalized thereunder are obliged to divest themselves of their original nationality, nor indeed is this anywhere in the law expressly made a condition to acquisition of German nationality. On the other hand, it is provided in Section 28 of the law that "a German who enters the service of a foreign country without the permission of his government may be declared to have lost his citizenship by decision of the central authorities of his home State, if he does not comply with an order to retire therefrom."

It is noteworthy that in several of its provisions the German law has departed from the principle that residence in the country is a prerequisite to naturalization. The performance of services to the state rather than domicile within its territory appears to be made the basis of German nationality. This idea is carried out in Sections 26 and 32, under which German nationality is lost by Germans residing abroad who have actually deserted from the army or failed to obtain a decision as to their military liability at the proper time, and by Section 27, under which Germans residing abroad may be declared expatriated in case they fail,

³ Reichs und Staatsangehörigkeitsgesetz, Leipzig, 1913.

in time of war or danger of war, to comply with an order of the Emperor to return.

The most remarkable provision of this law is found in Section 25, which, after stating as a general rule that German nationality is lost by naturalization abroad (a concession long ago made in the Bancroft treaties in cases of Germans naturalized in this country), makes the following exceptional provision:

Citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home State to retain his citizenship. Before this consent is given the German consul is to be heard.

The Imperial Chancellor may order, with the consent of the Federal Council, that persons who desire to acquire citizenship in a specified foreign country, may not be granted the consent provided for in paragraph 2.

According to this provision, a German residing in a foreign land may acquire naturalization therein without giving up his German nationality unless the laws of that country require the renunciation of the prior allegiance. This provision is apparently intended for the benefit of Germans residing in foreign lands which extend the franchise, the right to hold real property, etc., only to their citizens.

"Dual nationality" in cases of minors, who may be citizens of one country under the *jus soli* and citizens of another under the *jus sanguinis*, is generally recognized, but the new German law makes it possible for persons who have attained majority to assume of their own volition a dual nationality. Perhaps from the standpoint of the two countries concerned, the term "alternate nationality" might be applicable, at least so far as the actual right to protection on the one hand and duties of allegiance on the other are concerned. It will be interesting to learn how this system, under which a man may, at least nominally, serve two political masters, works out. It is to be inferred that a German who acquires a foreign citizenship and still retains his German nationality will be obliged to submit himself unreservedly to the jurisdiction of that one of the two countries concerned in which he happens to be residing. While he is residing in one of them, he presumably cannot call upon the other for any protection whatsoever. On the other hand, it does not seem reasonable to suppose that he could be recalled for military

service from either of the countries concerned by the other. In case of war between the two countries, his position would seem to become anomalous. One obvious question is whether he could be held guilty of treason in case he should take up arms against either country in the army of the other.

While this provision of law may possibly help in some respects to solve the problem mentioned at the beginning of the article, it will doubtless be the cause of some quite difficult questions. It may be added that this provision can have no application to Germans who are naturalized as citizens of the United States, since it is a specific requirement of our naturalization law that an alien who applies for naturalization must expressly renounce allegiance to all other sovereignties, and particularly by name to the sovereignty to which he at the time owes allegiance. On the other hand, it is provided in the second section of our Expatriation Act of March 2, 1907, that an American expatriates himself by obtaining naturalization in a foreign country or taking an oath of allegiance thereto. In this, as well as in other respects, our law of citizenship differs materially from the new German law.

Under Sections 18 to 24 of the law in question, Germans may obtain certificates of expatriation upon application, except, generally speaking, those who are liable for the performance of military service. In view of the provision of Section 25, that German nationality is lost by naturalization abroad, unless specially reserved, these provisions for obtaining certificates of expatriation appear at first sight superfluous, since it is hardly conceivable that any German will desire to divest himself of his German nationality unless he expects to acquire a new nationality. Doubtless these provisions were intended to apply to cases of transfer of citizenship from one Federal State to another, and to enable a person leaving Germany to obtain a clean bill of health, so to speak, as to his military liability.

The only provision of our own laws, under which native Americans may lose their American citizenship, is the first paragraph of Section 2 of the Act of March 2, 1907, which reads as follows:

That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

The Department of State has ruled in many cases, however, that native Americans residing abroad permanently, under conditions which make it apparent that they have abandoned their country, are not entitled to the protection of the United States Government. In former years the Department held that a definite intention to return to this country to reside on the part of Americans residing abroad was in all cases a condition precedent to protection by this Government, but this hard and fast rule was modified by a circular instruction to diplomatic and consular officers of July 26, 1910, in which it was stated in effect that, while a lack of intention to return to this country raises a presumption of expatriation, such presumption may be overcome. In making this change the Department doubtless had in mind the same conditions of modern intercourse between nations which lie at the root of the changes in the German law noted above.

While protracted residence abroad does not, under any statute of the United States, work expatriation in the case of a native American citizen, it may in the case of a naturalized citizen, for the second paragraph of Section 2 of the Act of March 2, 1907 provides as follows:

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Under the rules prescribed by the Department of State in pursuance of this law, the presumption of expatriation arising under it may be overcome by showing that the person concerned is residing abroad principally as a representative of American trade and commerce and intends to return to this country, or that he is residing abroad for health or education and intends to return, or that he has been prevented by some unforeseen and controlling exigency from returning and intends to return to the United States upon the removal of the preventing cause. There are some special rules applicable to persons residing in countries in which

the United States exercises extra-territorial jurisdiction, and the Department of State has always held that American missionaries, that is, persons residing abroad as representatives of American church organizations, do not expatriate themselves by such residence.

The precise meaning and effect of the statutory provision last quoted was for some time in doubt, but it seems to be pretty generally agreed now that its object is to furnish a definite rule for determining when protection should be withdrawn from naturalized citizens residing abroad, and that the presumption which it raises never becomes conclusive and is canceled in case the person concerned returns to this country to reside permanently.⁴ It has been contended that this law is unjust in that it draws a distinction between naturalized and native citizens. However plausible this argument might appear in theory, it remains true that the adoption of the law as it stands was well warranted by actual conditions. It was intended, as stated, to furnish a definite rule for determining the status of naturalized citizens residing abroad and to supply a clear statutory sanction for the withdrawal of protection from that large class of false citizens, who have acquired, or may acquire, naturalization in the United States, not with the intention of casting in their lot permanently with this country and performing the usual duties of citizenship, but merely in order to avoid the performance of military and other duties in their native lands, or in other foreign countries, where they may wish to reside. In practice the law has clearly been justified.

The recent changes in the citizenship laws of Germany and our own country are indications that citizenship laws in general are still in a state of flux. Other changes, resulting from further political and commercial developments, may be looked for in the future, and it is to be hoped that they will be accompanied by international agreements under which disputed questions of citizenship and the right to protection may be set at rest. In particular more satisfactory laws and agreements are needed for deciding the status of persons who are born and reside in countries of which their parents are not citizens, and who, under present laws, have a dual nationality.

A most serious and far reaching problem pertains to the status of

⁴ See opinion of the Attorney General in the case of Nazara Gossin, 28 Op. Att'y Gen. 504.

persons who leave their native land and settle permanently in a foreign country, without acquiring its citizenship or taking part in its political life. When such persons settle in large numbers in any country, the question becomes vitally important, especially when the immigrants and their children form a distinct community, which, as in some cases, becomes practically an *imperium in imperio*. As a result of the "new immigration" this has become an important problem in our own country. While it is true that our Government has more than once protested against the application to our own citizens residing in foreign countries of laws under which they are naturalized against their will,⁵ there is certainly something to be said in favor of such laws, provided they are not too stringent and make exceptions in cases of persons residing abroad as representatives of commercial or other concerns of their native lands. It is difficult to understand how such laws can be reasonably objected to when applied to ordinary immigrants or "settlers."

As to the right of an individual to throw off his original allegiance at will in acquiring a new citizenship the laws of different nations vary widely. In our own country applicants for naturalization were never required to obtain the consent of their original sovereigns before acquiring American citizenship, but our courts for some years questioned or actually denied the right of Americans to throw off their citizenship and acquire another nationality. Considering the fact that our nation was largely made up of voluntary expatriates, this view now seems inconsistent and unreasonable. In a joint resolution of July 27, 1868, Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness"⁶ and finally in Section 2 of the Expatriation Act of March 2, 1907, it was definitely declared that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state, or when he has taken an oath of allegiance to any foreign state." This, however, is qualified in the second paragraph, in which it is provided "that no American citizen shall be allowed to expatriate himself when this country is at war." In other words, the right of Americans to expatriate themselves

⁵ See Moore's International Law Digest, Vol. III, pages 302-311.

⁶ Revised Statutes, 1999.

is absolute during the continuance of the normal condition of peace, but this right is suspended when the country is in the abnormal condition of war. The reasons for the limitation are obvious. Such is also British law as interpreted and applied in the case of *Rex v. Lynch* (L. R. 1903, 1 K. B. 444). The law of Italy permits an Italian to change his nationality at will, but denies that his doing so relieves him from the obligation of military service in Italy.⁷ Under French law a Frenchman cannot expatriate himself unless he has performed the prescribed military service in France or has obtained the express permission of the government.⁸ A Swiss citizen, to effectively renounce his allegiance, must obtain the approval, not of the Federal Government, but of the Canton to which he belongs.⁹ Russia and Turkey still hold fast to the doctrine of indissoluble allegiance, denying their subjects the right to cast off their allegiance without special permission.¹⁰ A British subject expatriates himself by obtaining naturalization as a citizen of another country. The present British law of nationality also contains a peculiar provision according to which an alien who acquires British nationality "shall not, when within the limits of the foreign state of which he was a subject previous to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect."¹¹ This provision will be abandoned if the British Nationality and Status of Aliens Act, now before Parliament, becomes a law, for Part II, Section 3, Sub-section (1) provides as follows:

A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject.

This change, it will be observed, is in the contrary direction from the change in the new German law mentioned above.

⁷ Civil Code, Articles XI and XII.

⁸ Law on Nationality of June 26, 1889, Art. XVII, Sec. I.

⁹ Naturalization Law of 1903, II, Arts. XIII and IX.

¹⁰ Russian Penal Code, Art. 325. Ottoman Law of Nationality of 1869, Art. V.

¹¹ Naturalization Act of 1870, Sec. 7.

The United States has treaties of naturalization with Great Britain, Austria-Hungary, German States, Belgium, Denmark, Norway, Sweden, Portugal and most of the Latin American countries, and it is much to be desired that similar treaties be obtained with France, Italy, Switzerland, Turkey, and Russia, and indeed all of the countries of the world which have not yet consented to enter into agreements calculated to put an end to controversies concerning expatriation. It is also to be hoped that other disputed questions of citizenship, some of which have been touched upon above, may be settled, and that a harmony which does not now exist may be attained, through legislation and international agreements. If such a consummation is to be reached the interests of the countries of immigration and the interests of the countries of emigration must be equally considered, and a reasonable compromise sought between the rights of nations and the rights of individual members thereof. The whole subject of the law of citizenship, in which there is now so much confusion, or at least, in particular phases of it, might well be made a topic of discussion by the Hague Conference.

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